

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

28911

FILE: B-213708

DATE: July 25, 1984

MATTER OF: J. Sklar Mfg. Co., Inc.

DIGEST:

Protest that ophthalmological tonometer should have been considered a specialty metal item subject to the restrictions of the preference for domestic specialty metals clause, Defense Acquisition Regulation § 7-104.93(b), is dismissed as academic where contracting agency agrees with protester and takes only corrective action possible in the circumstances of the case.

J. Sklar Mfg. Co., Inc. (J. Sklar), protests the award of a contract for ophthalmological tonometers to the Surgical Instrument Company of America (SICOA), under request for proposals (RFP) DLA120-83-R-1406, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA).

We dismiss the protest because it is academic.

The solicitation contained the standard Defense Acquisition Regulation (DAR) preference for domestic specialty metals clause. DAR § 7-104.93(b), reprinted in 32 C.F.R. pts. 1-39 (1983). That clause essentially requires specialty metals provided under the contract to be melted in the United States. According to DLA, when the end item being purchased is considered a specialty metal, a notice to offerors stating that the end item is considered a specialty metal and the restrictions of the specialty metal clause apply is added to the solicitation.


Here, the contracting officer determined that the tonometer case was part of the end item being purchased. Since the case was not made of a specialty metal and was considered a large part of the end item, the contracting officer determined that the tonometer was not a specialty metal item. The specialty metal clause was included in the solicitation, but the notice to offerors was not added. That was the only indication that DPSC did not consider the tonometer a specialty metal.

029549

J. Sklar believed that because the tonometer itself consisted primarily of stainless steel, a specialty metal, it was considered a specialty metal end item. J. Sklar offered a tonometer with stainless steel melted in the United States. The low offeror, SICOA, apparently believed that the end item was not considered a specialty metal and offered a tonometer with stainless steel melted in West Germany. DPSC awarded the contract to SICOA, and J. Sklar protested, arguing that the tonometer case was not part of the tonometer and should not be used to transform the tonometer into a nonspecialty metal item.

In its response to the protest, DLA agreed with J. Sklar that the tonometer should have been considered a specialty metal item. Since the contract had already been substantially performed, DLA did not offer corrective action on this contract, but stated that in the future the tonometer would be considered a specialty metal item. DLA also pointed out that prior to award of the contract, specialty metals melted in West Germany had been exempted from the application of the specialty metals clause, so the award was not contrary to the specialty metals restrictions.

Since DLA has admitted error and provided the only corrective action that we could have recommended in these circumstances, consideration of the tonometer as a specialty metal item in future solicitations, no useful purpose would be served by our consideration of this protest. See, e.g., Northrop Services, Inc., B-211439, July 27, 1983, 83-2 C.P.D. ¶ 134. Consequently, we dismiss it as academic.


For Harry R. Van Cleve
Acting General Counsel